

does maintain direct contact with Amcell personnel. Each of Anna Hillman (Senior Vice President for Finance and Administration), Ray Dombroski (current Vice President for Engineering), David Watson (Senior Vice President for Sales and Marketing), John Moerman (General Manager for Atlantic City), and Jeffrey Smith (Vice President and General Counsel) have testified that they are in regular contact with Thompson and Lokting. Dominic Villecco (former Vice President of Engineering), testified to the same effect during the seven years when he was Amcell's technical interface with Thompson.³⁸⁴

143. Finally, while Amcell is the system's manager and thus is responsible for hiring, firing, and supervising its personnel on a daily basis, Amcell itself is subject to dismissal for cause by ETC.³⁸⁵ Accordingly, if any of Amcell's employees do not perform their duties in an acceptable manner, Thompson can, at his option, terminate his relationship with Amcell.³⁸⁶ Thus, Thompson has actual control over the Atlantic City system's personnel management.

5. Financial Obligations

i. **Amcell Has Not Assumed Financial Responsibility for the System**

144. In the HDO, the Commission expresses two concerns regarding the financial obligations criterion of Intermountain. The first is that "Amcell may have a degree of financial

^{384/} See supra part III ¶ 76.

^{385/} See supra part III ¶ 92.

^{386/} Id.

exposure which undercuts the significance of Thompson's formal responsibility for paying financial obligations."^{387/} In particular, the Commission was troubled by the \$800,000 payment made by Amcell to Thompson to keep open its option to buy the system,^{388/} and furthermore, the Commission was troubled by the Indemnity Agreement between Thompson and Amcell which calls for Amcell to pay Thompson \$1.5 million if Thompson's authority is revoked as a result of his relationship with Amcell.^{389/}

145. The Commission's concern over the financial exposure of Amcell relative to that of ETC is misplaced. First, the payment by Amcell to Thompson to keep open its option to purchase the Atlantic City system was a lawful and unremarkable occurrence. It was common, and consistent with Commission policy at the time, for managing agents to purchase an option to acquire the systems under their management.^{390/} Amcell paid valuable consideration for a contingent future right; it was in no sense an investment in the system.^{391/} Unless the Commission approves a transfer of control, Thompson remains the majority and controlling interest holder in the system and is entitled to receive 50.01% of its profits.^{392/}

^{387/} HDO at 7142.

^{388/} Id.

^{389/} Id.

^{390/} Riley Dep. Tr. page 18, lines 1-7. See Rodney A. McDaniel, 2 FCC Rcd 5402 (Mobile Serv. Div. 1987) (approving an option agreement between a cellular licensee and his turnkey manager under the Intermountain guidelines).

^{391/} See supra part III ¶ 34.

^{392/} See supra part III ¶ 98.

146. Second, it is common in the cellular industry, particularly for non-wireline systems, to completely fund construction and operating expenses with debt rather than equity.^{393/} ETC is the sole obligor on the Provident Bank loan, which is now approximately \$2.9 million. His stock in ETC is pledged as collateral for the loan.^{394/} Thus, Thompson's stake in the system is every bit as real as if he had made an equity contribution of an equivalent amount. Should there be a default and foreclosure on the \$2.9 million loan, Thompson's stake in the loss of his stock would be far greater than Amcell's investment in its option. The Indemnity Agreement with Amcell would be of no help to him in his circumstance.^{395/}

147. Third, the indemnification provision was a prudent business decision on the part of Thompson in light of the dispute with TDS regarding the Atlantic City system. It served to insure Thompson against the risks associated with his entering into the Construction and Switching Agreement.^{396/} In any case, the payment contemplated by the indemnity provision is contingent on the forfeiture of Thompson's license.^{397/} Thus, while it is true that Amcell has paid \$800,000 to Thompson for a contingent option,^{398/} and has pledged \$1.5 million more should Thompson lose his authorization for reasons related to Amcell's dispute with TDS,^{399/}

^{393/} Riley Dep. Tr. page 18, lines 8-23.

^{394/} See supra part III ¶ 57-58.

^{395/} See generally Thompson/Amcell Indemnity Agreement.

^{396/} See supra part III ¶ 33.

^{397/} Id.

^{398/} See supra part III ¶ 34.

^{399/} Thompson/Amcell Indemnity Agreement § 1(d).

Amcell has not advanced Thompson or ETC any funds to pay the system's financial obligations.^{400/} This stands in stark contrast to the facts in O'Neill where the prospective purchaser had invested hundreds of thousands of dollars in the system, without any specified terms regarding repayment.^{401/} As discussed below, the system has been financed entirely by the loan negotiated by Thompson with Provident Bank, and through the reinvestment of the system's profits.

**ii. Thompson Negotiated the Provident Loan
Independently of Amcell**

148. The Commission's second concern was whether the bank loan used to finance construction of the system was negotiated independently of Amcell.^{402/} While Amcell did introduce Thompson to the Provident Bank, this does not, as the Commission suggests, undermine Thompson's complete financial autonomy from Amcell. Amcell recommended Provident Bank because it had a good working relationship with the bank at the time and knew that Provident was the major lender to the cellular industry. After introducing Thompson to bank personnel, Amcell did not participate in the negotiation of the loan agreement. ETC is the sole borrower and guarantor under the loan and the only collateral for the loan is the Atlantic City system and Thompson's stock in ETC.^{403/}

^{400/} See supra part III ¶¶ 93-94.

^{401/} O'Neill at 2575 ¶ 28.

^{402/} HDO at 7142.

^{403/} See supra part III ¶¶ 57-59.

149. The now-deleted loan provision requiring the retention of Amcell as system manager was a requirement imposed by the bank, not Amcell.^{404/} No bank will loan money to a start-up company without assurances of professional management. That Thompson later renegotiated the loan agreement to remove that provision to assure compliance with the Commission's rules and policies only serves to highlight that the ongoing relationship between Thompson and the bank does not involve Amcell. In fact, the record shows that Amcell no longer uses Provident Bank as its lender.^{405/}

iii. Thompson Is Solely Responsible For the Financial Obligations of the Atlantic City System

150. Thompson is solely responsible for costs associated with the construction and operation of the system. Thompson must pre-approve the capital and operating budgets. Pursuant to the check-signing policy, Thompson must personally sign all checks for non-recurring expenses in excess of \$5,000.^{406/} Thompson has established separate bank accounts for ETC

^{404/} Riley Dep. Tr. page 18, line 24 through page 19, line 10.

^{405/} See supra part III ¶ 58.

^{406/} See supra part II ¶¶ 77-79. As previously noted, for certain specified categories of regularly recurring expenses, the policy provides that Thompson's signature is only required for checks in excess of \$25,000. Those categories include roamer payments to other systems, cell site leases, routine inventory purchases of cellular phones, and tax payments. In 1995, the policy was amended to allow Amcell to issue checks for agent commissions -- regardless of their amount -- without Thompson's signature, provided that Thompson is notified immediately of the issuance of such checks. The amendment was necessary to ensure compliance with agency contracts. All checks are issued within the parameters of the operating and capital budgets which Thompson helps to develop and must ultimately approve. Id.

in which all revenues from the system's operation are deposited. All expenses attributable to the system are paid out of the ETC accounts. Thompson alone determines who has access to those accounts and has limited such access to a few Amcell employees.^{407/} Aside from operating revenues, the only other source of funding for the system is the Provident loan facility.^{408/} Amcell has never advanced any funds to ETC or Thompson for the construction or operation of the system.^{409/} In contrast, the licensee in O'Neill was given money by the manager to meet system operating expenses without specified terms as to interest or repayment, was paid a salary by the manager to be a consultant, and was given an advance on the purchase price for the system.^{410/}

6. Receipt of Monies and Profits

i. Thompson's Decision to Defer Distributing Profits Does Not Undermine His Control Over the Receipt of Monies and Profits

151. In its analysis of the sixth Intermountain factor, the receipt of monies and profits, the Commission expressed concern over Thompson's decision to defer distributing profits.⁴¹¹

^{407/} See supra part III ¶ 93.

^{408/} See supra part III ¶ 94.

^{409/} Thompson Dep. Tr. page 41, lines 10-15. See supra part III ¶ 94.

^{410/} O'Neill at 2575 ¶ 28.

⁴¹¹ HDO at 7142.

The Commission was troubled by the possibility that Thompson's failure to pay out dividends was related to Amcell's expected acquisition of the system.⁴¹² These concerns are misplaced.

152. Several factors should be noted in connection with Thompson's decision to defer the distribution of profits, other than for tax purposes.⁴¹³ First, the record is clear that the decision was, in fact, Thompson's and not Amcell's. Second, Thompson had no basis on which to calculate when or to whom he would sell the Atlantic City system. The contingent option with Amcell was executed in December of 1987. At the time, FCC litigation between Amcell and TDS was already underway and civil litigation commenced shortly thereafter. In each forum, the validity of the CMS Agreement's two-thirds approval provision and of each party's right to acquire the system was in issue.⁴¹⁴ Therefore, Thompson had no way of knowing whether or when Amcell would ever be able to exercise its contingent option. Accordingly, the expectation of a sale to Amcell was not a basis for the delay in distributions.

153. A third factor pertinent to the delay in distributions was the uncertainty caused by litigation over the CMS Agreement. A key issue in that litigation was the nature of the entity to be formed to bring the minority interest holders into equity ownership of the Atlantic City system, as required by the CMS Agreement. For quite some time, Thompson had felt that it was not prudent to make distributions in advance of the resolution of that issue.⁴¹⁵

⁴¹² Id.

⁴¹³ Lokting Dep. Tr. page 88, line 18 through page 89, line 25. There have been distributions of profits of approximately one and one-half to two million dollars to Thompson to allow him to pay the tax liability that accrues as a result of the system's taxable income. Lokting Dep. Tr. page 87, line 16 through page 88, line 3.

⁴¹⁴ See generally part III ¶¶ 35-49.

⁴¹⁵ Lokting Dep. Tr. page 89, lines 6-16.

154. A fourth factor related to the delay in distributing profits involved a provision in the Provident loan agreement which requires the bank's approval of distributions. Such loan covenants are standard in the cellular industry and are designed to assure that satisfactory financial operating ratios are maintained. During the past year, prior to the issuance of the HDO, Thompson approached the bank and, in light of the very positive forecasted revenues for the system, he was able to obtain consent for a distribution.⁴¹⁶ He has decided, however, with the issuance of the HDO to defer the distribution pending the outcome of the instant proceeding.⁴¹⁷

155. Finally, the Atlantic City system, like many non-wireline systems built by lottery winners, was completely financed through debt.⁴¹⁸ In order to avoid incurring substantial additional debt, subsequent improvements to the system were funded through the reinvestment of operating revenues.⁴¹⁹ Given the desire of owners to avoid substantial debt and the highly competitive nature of the cellular industry, reinvestment of profits to make capital improvements was common business practice.⁴²⁰ Thompson's reinvestment of profits has allowed the Atlantic City system to grow from four to eleven cells and to serve well in excess of 10,000 customers.

156. In sum, the record shows that Thompson had sound business reasons for deferring distributions wholly independent of his contractual relationship with Amcell. If anything,

⁴¹⁶ Lokting Dep. Tr. page 88, line 24 through page 89, line 5. See supra part III ¶ 100.

⁴¹⁷ See supra part III ¶ 100.

⁴¹⁸ Riley Dep. Tr. page 18, lines 8-23.

⁴¹⁹ See supra part III ¶ 99.

⁴²⁰ Riley Dep. Tr. page 20, lines 9-20.

Thompson's decision to defer distributions and plow revenues back into the business was another indicium

of his control of monies and profits under the Intermountain criteria.

ii. Thompson is Solely Responsible For the Receipt of Monies and Profits

157. All funds derived from operation of the system are deposited directly into ETC's accounts.⁴²¹ Those accounts are controlled by Thompson. There is no comingling of the system's funds with accounts controlled by Amcell.⁴²²

158. As majority owner, Thompson is entitled to 50.01% of the system's profits. Thompson's decision to reinvest, rather than distribute, those profits is indicative of his control over the system's revenues.⁴²³

159. Despite his decision not to disburse profits, Thompson does benefit financially from the system, receiving a monthly salary from ETC, currently around \$12,000.⁴²⁴ Thompson, as the company's President and only shareholder, is solely responsible for setting the amount of that salary; Amcell plays no role whatsoever in that determination.⁴²⁵

⁴²¹ See supra part III ¶ 97.

⁴²² Id.

⁴²³ See supra part III ¶ 98.

⁴²⁴ See supra part III ¶ 101.

⁴²⁵ See supra part III ¶ 101.

160. As previously noted, in May of 1992, following the Oregon court's grant of summary decision invalidating the TDS option, Thompson and Amcell executed an agreement providing for Thompson's exercise of the Thompson/Amcell Contingent Option Agreement. Thompson negotiated for a provision in the Exercise Agreement which factors the system's retained earnings into the calculation of the consideration that Amcell will pay for the system at closing.⁴²⁶ Accordingly, Thompson has every incentive to ensure that the system's operations are profitable and he is actively committed to its success.

V. CONCLUSION

161. The cellular lottery process was predicated on the assumption that there would be a large pool of applicants from all walks of life who, upon meeting established eligibility criteria, would be free to determine how best to provide service to the public.⁴²⁷ The Commission recognized that applicants new to the telecommunications industry were likely to retain experts to manage construction and operation of their systems on a turnkey basis.⁴²⁸ Ellis Thompson was such an applicant. In engaging Amcell to construct, maintain, and operate the Atlantic City

⁴²⁶ See supra part III ¶ 33.

⁴²⁷ See Cellular Lottery Decision, 98 FCC 2d 175, 186-87 (1984).

⁴²⁸ Id. In a case decided shortly before Thompson engaged Amcell to manage the system, the Commission found the background of a licensee's principals to be of "no decisional relevance" because no facts were raised concerning the "licensee's inability to participate in, or make satisfactory arrangements to ensure efficient development of the [cellular system.]" Delray Cellular Associates, 3 FCC Rcd 5162, 5163 n. 5 (1988) (emphasis added).

system on ETC's behalf, Thompson complied with his obligation as an applicant and licensee to ensure that operation of the system was efficient and in the public interest.

162. In designating this case for hearing, the Commission noted the Court's concern about apparent inconsistencies in the Commission's application of the Intermountain criteria to Thompson, on the one hand, and the applicant under scrutiny in La Star on the other.⁴²⁹ Having had benefit of the comprehensive factual record developed in discovery in the instant proceeding, it is clear that the seeming inconsistencies perceived by the Court were more apparent than real and were largely the product of the completely different posture of the applicants in the two cases. As previously noted, the HDO is primarily concerned with Thompson's tenure as a licensee of an operating system, whereas the hearing in La Star dealt exclusively with the prosecution of an application. The six Intermountain criteria all pertain to the retention of control of an operating system, not an application. Therefore, it is understandable that the Commission's application of such criteria to the applicant in La Star was not always congruent with its analysis of Thompson.

163. The contrast between the conduct of Thompson and the applicant in La Star is compelling. The Commission found that the parties in La Star "did not observe the formalities of [their] joint venture agreement" and that the nominal minority partner assumed control of the applicant.⁴³⁰ No such evidence is present in Thompson's case. The record is clear that Thompson fully exercised his ownership and control prerogatives while he was an applicant and continues to do so as the controlling party of an operational system. During most of the period

⁴²⁹ HDO at 7139.

⁴³⁰ La Star, 7 FCC Rcd at 3763.

at issue in La Star, there were no management committee meetings or financial audits, and no general manager was appointed or engineering subcommittee established, as required by the joint venture agreement.⁴³¹ Moreover, even if these formal control mechanisms had been observed, the provision of the joint venture agreement requiring the nominal minority partner's vote on 13 different actions, in and of itself, constituted an impermissible delegation of control.⁴³² In addition, the minority partner executed cell site agreements, selected and hired all system employees, financed the prosecution of the application, and approved and paid all expenses.⁴³³ By contrast, the record shows that Thompson paid for his own application, hired Amcell (over the objection of TDS) to construct, switch and ultimately manage the system, executed all cell site and business office leases, executed a myriad of business-related contracts, owns all equipment except for the switch, and signed and approved thousands of checks pursuant to his own check writing policy. Moreover, Thompson's company, ETC, is the sole obligor on the \$2.9 million Provident loan, which is secured by the system and Thompson's stock in ETC. Finally, Thompson does observe the formalities of his management agreement with Amcell, regularly meeting and communicating with Amcell over the past eight years to assure that actual control is maintained. Based on the demonstrably different record in each case, the Presiding Judge may conclude with certainty that the result obtained in La Star and the decision which movants urge here are fully justified and consistent.

⁴³¹ Id.

⁴³² Id.

⁴³³ Id.

164. In addition to its concern with the La Star decision, the Court was also troubled by its perception that the Commission had failed to reconcile Thompson's case with the precedent of O'Neill. The Court felt that the Commission had not adequately differentiated Thompson's role in the operation of his system as a Washington resident from O'Neill's disfavored "walking away."⁴³⁴

165. The record in this case unambiguously belies that concern. The consulting agreement in O'Neill, like the Management Agreement in the instant case, on its face comported with the Commission's control requirements by vesting full ownership and control in the licensee. However, the two cases diverge on the licensees' actual exercise of their respective control rights. The record amply demonstrates that notwithstanding Thompson's Washington residence, he has unfettered use of the system's equipment,⁴³⁵ direct personal involvement in the system's day-to-day operations, control over its policies, finances and revenue, and control over its personnel through his regular and direct supervision of Amcell.

166. O'Neill, on the other hand, "walked away from certain critical responsibilities," abdicating all control over the system's operation and policies to his management agent.⁴³⁶ Though he was retained as a "consultant," he was "hard pressed to explain what his duties [were]."⁴³⁷ Moreover, as a consultant, O'Neill was actually an employee of the manager, and,

⁴³⁴ O'Neill at 2575 ¶ 30.

⁴³⁵ See supra part III ¶¶ 68-72.

⁴³⁶ O'Neill at 2575 ¶ 30.

⁴³⁷ Id. at 2575 ¶ 28.

unlike Thompson, did not set or pay his own salary.⁴³⁸ The manager further undermined O'Neill's control over the system's finances by providing him with approximately \$600,000 to meet operating expenses.⁴³⁹ These funds were advanced without any provision for their repayment.⁴⁴⁰ Unlike O'Neill, Thompson funded construction and operation of his system with what is now a \$2.9 million loan on which ETC is the sole obligor. Amcell is not a guarantor of the loan. Rather the loan is secured by the system's assets and Thompson's stock in ETC. Finally, in O'Neill's case, revenues from the system's operations were deposited in accounts controlled by the manager, not O'Neill. Thompson, on the other hand, has his own accounts and there is no comingling of funds between the licensee and the system manager. Thus, starkly different findings of fact in these two cases are compelled by a reasoned application of the Intermountain guidelines. Thompson retained actual control, O'Neill did not.

167. In light of the above, there is no material question of fact requiring an evidentiary hearing. There has been no transfer of control of Thompson's application or of the Atlantic City system, and ETC remains fully qualified to be a Commission licensee.

WHEREFORE, in view of the foregoing, it is respectfully requested that the Presiding Judge grant summary decision and reinstate the Commission's grant of Thompson's application.

⁴³⁸ Id.

⁴³⁹ Id.

⁴⁴⁰ Id.

Respectfully submitted,

ELLIS THOMPSON CORPORATION

By: Richard Rubin

Stuart F. Feldstein
Richard Rubin

Fleischman & Walsh, L.L.P.
1400 Sixteenth Street, N.W.
6th Floor
Washington, D.C. 20036

By: Steve Larson (LRL)

David Lokting
Steve Larson

Stoll, Stoll, Berne,
Lokting & Shlachter, P.C.
209 S.W. Oak Street
Portland, Oregon 97204

AMERICAN CELLULAR NETWORK
CORP. D/B/A COMCAST CELLULAR

By: Louis Gurman

Louis Gurman
Jacob S. Farber

Gurman, Blask & Freedman,
Chartered
1400 Sixteenth Street, N.W.
Suite 500
Washington, D.C. 20036

CHIEF, WIRELESS TELECOM-
MUNICATIONS BUREAU

By: Joseph Paul Weber

Joseph Paul Weber
Terrence E. Reideler

Wireless Telecommunications Bureau
Federal Communications Commission
1919 M Street, N.W., Rm 644
Washington, D.C. 20554

July 14, 1995

CERTIFICATE OF SERVICE

I, Jamie Whitney, a secretary in the law offices of Gurman, Blask and Freedman, Chartered, do hereby certify that I have on this 14th day of July, 1995, had copies of the foregoing "Joint Motion For Summary Decision" mailed by U.S. first class mail, postage prepaid, to the following:

- * Honorable Joseph Chachkin
Federal Communications Commission
2000 L Street, N.W., Room 227
Washington, D.C. 20554

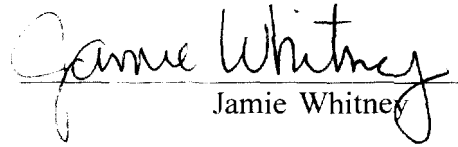
- * Joseph Paul Weber, Esquire
- * Terrence E. Reideler, Esquire
Wireless Telecommunications Bureau
Federal Communications Commission
1919 M Street, N.W., Room 644
Washington, D.C. 20554

- * Alan Y. Naftalin, Esquire
- * Herbert D. Miller, Esquire
Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Suite 100
Washington, D.C. 20036

- * Stuart F. Feldstein, Esquire
- * Richard Rubin, Esquire
Fleischman & Walsh, P.C.
1400 Sixteenth Street, N.W.
6th Floor
Washington, D.C. 20036

David A. Lokting, Esquire
Steve Larson, Esquire
Stoll, Stoll, Berne,
Lokting & Shlachter, P.C.
209 S.W. Oak Street
Portland, Oregon 97204

Alan N. Salpeter, Esquire
Michele Odorizzi, Esquire
Mayer, Brown & Platt
190 South La Salle Street
Chicago, IL 60603


Jamie Whitney

* Hand Delivered